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No. 91-119

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 15 U.S.C. § 381, which prohibits states from taxing foreign corporations whose only activities within the state are the solicitation of orders, bar the assessment and collection of Wisconsin franchise tax from Respondent for the years 1973-1978?

The Wisconsin Supreme Court answered this question in the affirmative.

LIST OF PARTIES

The Respondent, Wm. Wrigley Jr. Company, is a corporation. Respondent has no parent companies or subsidiaries (except wholly owned subsidiaries) to list pursuant to Rule 29.1.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

This issue in this case is whether the Wisconsin Supreme Court properly applied a statute, 15 U.S.C. § 381, to the activities of certain employees of the Respondent, Wm. Wrigley Jr. Company ("Wrigley") in Wisconsin during the years 1973 through 1978. The outcome in this case, as it is in each case that arises under this statute, is dependent upon its unique facts and circumstances. A review of the application of that statute in this case necessarily requires a careful review of the facts.

In its Statement of the Case, the Petitioner, the Wisconsin Department of Revenue ("DOR"), gives a highly selective summary of the factual and procedural background of this case. As a result of highlighting some facts and passing over others, DOR has mischaracterized the factual background of this case and has exaggerated the significance of a few elements of this case in disregard for the totality of the circumstances out of which this case arises.

For example, as if to suggest that Wrigley maintained an inventory of goods for sale within Wisconsin (an act that would cause Wrigley to lose the protection of the statute at issue), DOR asserts that "Wrigley's sales representatives maintained substantial stocks of gum, carried on company books as inventory . . ." Petition at 6. However, the portion of the record to which DOR refers the Court does not support that statement (note the conspicuous absence of any finding that the "stocks" of gum were "substantial"). Furthermore, DOR skirts the fact that these "stocks" of gum were not sold, but merely were used for promotional purposes. Nor does DOR mention that 35-40% of this "inventory" was stale, or that the gum carried by each salesperson had a value of only about $1,000.00. *See William Wrigley, Jr. Co. v. Department of Revenue*, 160 Wis. 2d 53, 66, 465 N.W.2d 800, 804 (1991), reprinted in Petitioner's Appendix at A-1, A-16 (hereinafter, references to the decision below will be to the pages of the Petitioner's Appendix).

Other examples of DOR's partial treatment of the facts can be found by comparing DOR's Statement with the summary of the case stated by the Wisconsin Supreme Court in its decision. *See* A-11 - A-22. Accordingly, for its statement of the case, Wrigley hereby adopts the summary contained in the decision of the Wisconsin Supreme

Court, and encourages the Court to review that summary for a complete, balanced exposition of how this case arose.

A comparison between DOR's Statement and the Wisconsin Supreme Court's summary shows how fact-intensive this case is, and of what limited use further review of this case would be. The comparison demonstrates how dependent the application of Section 381 is upon the inferences to be drawn from the evidence and upon the weight assigned to certain facts.[1] Indeed, the lengths to which DOR goes in trying to skew the facts in its favor shows that this case involves much more of a clash between different views of the evidence and the facts than it does a conflict of views regarding the correct interpretation of 15 U.S.C. § 381.[2]

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[1] In this regard, it is noteworthy that, despite the conflict alleged to exist among various tribunals regarding the proper interpretation of Section 381, no court faced with the precise mix of activities in which Wrigley engaged in Wisconsin has held them to exceed the scope of Section 381. To the contrary, as the Wisconsin Supreme Court pointed out in the decision below (*see* A-38 - A-40), in the one case where precisely the same kind of activities were at issue, the outcome was the same as below. *In the Matter of the Petition of William Wrigley, Jr. Company*, a copy of which is appended to this brief at a.3.

[2] This clash is further demonstrated by an item in the record which DOR did not include in its appendix. The record in this case was made at an evidentiary hearing conducted by the Wisconsin Tax Appeals Commission ("TAC"). The TAC initially found in favor of DOR. This decision was reversed by the Circuit Court for Dane County, however, because the TAC had failed to consult with the Commissioner who actually heard the evidence and whose "factual determination was material to the Commission's Decision and Order." *See* A-8, A-207, A-215 - A-216. DOR attempts to minimize the importance of this reversal by referring to it as a "procedural remand." Petition at 2. Moreover, DOR neglects to include in the appendix to the Petition the written "Impressions" of that Commissioner, who wrote that he would have found in

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REASONS FOR DENYING THE WRIT

In essence, DOR seeks review of two points of statutory construction: (1) the validity of the Wisconsin Supreme Court's interpretation of the meaning of the statutory term "solicitation" and (2) its construction of the term "only." DOR asserts that the Wisconsin Supreme Court's interpretation of those terms is in error and that a conflict among state courts as to the meaning of those terms requires the intervention of this Court. DOR's position is without merit.

I.

THE WISCONSIN SUPREME COURT DID NOT ERR IN CONSTRUING THE STATUTORY TERM "SOLICITATION"

DOR's first reason for granting a writ in this case is that the Wisconsin Supreme Court's construction of the statute is impermissibly broad in that it "alters the pre-existing powers of the states to a degree not supported by clearly expressed textual language." Petition at 16. The pre-existing state power that DOR claims to have been altered is an alleged state power to tax the income of foreign corporations. DOR's reasoning is flawed in three ways.[3]

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[2] *continued*
favor of Wrigley based on the evidence he heard. Although the TAC later reinstated its finding in favor of DOR, it seemed to do so totally without regard to the inferences drawn by that Commissioner or the weight he assigned to the evidence he heard as trier of fact. The Impressions are appended to this Brief at a.1.

[3] DOR's argument also should be rejected because the argument was not raised for consideration by the courts and administrative bodies below. Although the brief DOR submitted to the Wisconsin Supreme Court contains citations to and quotes from some of the same authorities DOR quotes at pages 12 and 14 of its Petition, DOR did not in any way articulate or develop the theory

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1.

First, DOR's argument is premised upon a mistaken view of the constitutional framework within which Section 381 operates. DOR contends that review of this case is necessary because the interpretation given Section 381 by the Wisconsin Supreme Court is inconsistent with "traditional due process apportionment principles." Petition at 21. DOR apparently is arguing that states have a *right* to apportion the income of foreign corporations based on the Due Process clause of the Fourteenth Amendment. *See* Petition at 16. In so arguing, DOR misunderstands the constitutional role of "apportionment."

The term "apportionment" describes a right, protected by the Due Process clause of the Fourteenth Amendment, to have any tax imposed on interstate business operations to be "fairly apportioned." *Trinova Corp. v. Michigan Dept. of Treasury*, ___ U.S. ___, 111 S. Ct. 818, 828 (1991); *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 165-166 (1983). However, it is the *taxpayer*, not the *state*, that is protected by this right.[4] It is simply not true that a state owns some constitutional right or power to "apportion" which it may invoke against

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[3] *continued*
of statutory construction it advances in its Petition. Despite the fact that the proper interpretation of the statute has been in issue from the outset of this case, DOR has chosen to wait until now to assert in any substance this statutory construction argument. A petitioner may not raise matters before this Court which it failed to raise before the lower courts. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

[4] DOR's invocation of the Due Process clause presumes, mistakenly, that the Fourteenth Amendment confers rights upon states (as opposed to "persons"), which it does not. *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966); *Wisconsin v. Zimmerman*, 205 F. Supp. 673, 675 (W.D. Wis. 1962).

a taxpayer and upon which the Wisconsin Supreme Court's interpretation of Section 381 could act as a limitation.

The companion to the principle of "apportionment" is the requirement of "nexus." Due process requires, in addition to a fair apportionment, that a state have some minimal connection ("nexus") with a business before imposing its tax. *Trinova*, 111 S. Ct. at 828; *Container Corporation*, 463 U.S. at 165.

DOR's analysis of Section 381 also mistakes the difference between these two requirements. DOR states that the statute was enacted to create an exception to "apportionment." Petition at 16. However, as the Court clearly explained in *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 280 (1972), Section 381 was enacted in response to the "nexus" requirement, not the requirement of fair apportionment. The statute addresses the level of activity in which a business can engage within a state's borders before becoming subject to taxation. Absent the statute, the quantum of "connection" necessary to support an exercise of state taxing authority was and is quite low. In Section 381, however, Congress, in the exercise of its power to regulate interstate commerce, has demarcated an activity—solicitation—in which businesses may engage within the borders of a state without subjecting themselves to taxation, even though a "nexus" sufficient to pass constitutional muster otherwise may exist.

It never has been disputed that Wrigley's business would have "nexus" with Wisconsin and would be subject to its jurisdiction to tax—in the absence of Section 381. DOR is simply attempting for the first time to craft a new rule of statutory construction sounding as if this case presents a constitutional issue. It does not.

2.

The major premise of DOR's argument is stated in terms which sound like a canon of statutory construction: Any statute which "override[s] the states' pre-existing powers or sovereign authority" must be construed narrowly. Petition at 12, 16. That premise is unsupportable in this case.

Even if there were such a canon, it would have no application in this case because Section 381 does not override any authority that belongs to the states. Section 381 does limit the states' ability to tax interstate businesses—but such regulation is completely within Congress's power under the Commerce Clause. *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 150 (1979); *Heublein*, 409 U.S. at 282 n.9. *See also Wrigley*, A-26; *International Shoe Co. v. Cocreham*, 246 La. 244, 164 So.2d 314, 322, *cert. denied sub nom. Mouton v. International Shoe Co.*, 379 U.S. 902 (1964). Not surprisingly, DOR raises no challenge to Congress's authority to enact this statute. Because interstate commerce is within the domain of Congress to regulate, there is no basis for the contention that Section 381's restriction of state taxation upon interstate commerce must be construed narrowly.

Furthermore, the canon DOR would have this Court apply does not appear to even exist. Certainly DOR cites no authority for such a canon. DOR does cite three decisions of this Court (Petition at 12, *citing Heublein*; *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); and *Bowen v. American Hospital Association*, 476 U.S. 610 (1986)), but the rule applied by the Court in those cases is entirely different than the canon DOR tries to articulate here. None of those decisions command a particularly "broad" or "narrow" reading of a statute. Instead, those

cases stand for the entirely different proposition that the Court will not infer any restriction upon a state's internal powers which is not expressly stated in the federal statute. That rule is perhaps best stated in this Court's decision in *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261 (1943), *cited in Bowen*, 476 U.S. at 644 n.33:

> An unexpressed purpose of Congress to set aside statutes of the states *regulating their internal affairs* is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous.

318 U.S. at 275 (emphasis added). This rule was applied in *Heublein*, where the Court determined that Congress's *explicit* prohibition of taxation upon interstate solicitation did not *implicitly* extend to local regulatory schemes which required taxpayers to engage in conduct that forced them to exceed the scope of protected solicitation, and thereby give up their immunity under Section 381. *Id.*, 409 U.S. at 279, 282.

The rule of construction illustrated by the cases cited by DOR does not support the supposed canon of construction which DOR attempts to articulate. Nor does the rule in cases like *Heublein* and *Penn Dairies* command that Section 381 be construed any differently than it was construed by the Wisconsin Supreme Court. The rule simply does not apply because the matter being regulated by Section 381—state taxation upon interstate commerce—is clearly within the domain of Congress to regulate, not within an internal state domain that is privileged from federal regulation.

In short, the major premise of DOR's argument is unsupportable and, as a consequence, the rest of the argument must fail.

3.

The final flaw in DOR's argument is that it overstates the effect of the Wisconsin Supreme Court's decision. DOR attempts to create the impression that the Wisconsin Supreme Court's decision is so unreasonably broad as to create the presumption that, in Wisconsin, interstate business is now immune from taxation. *See* Petition at 16-17.

DOR is exaggerating. The Wisconsin Supreme Court simply has applied the statute to the facts of this case, taking into account the commercial practicalities of promoting a perishable product and of administering a distant sales force. That interpretation is entirely consistent with the interpretations adopted and enforced in a number of other states. Indeed, this Court already has declined a request to review a similar interpretation adopted by the Supreme Court of Pennsylvania in *United States Tobacco Co. v. Commonwealth*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978).

Because the language of Section 381 readily supports the limited, commercially sensible interpretation of the term "solicitation" given the statute by the Wisconsin Supreme Court, there is no reason to review the Wisconsin Supreme Court's decision in this case.

II.

THE WISCONSIN SUPREME COURT DID NOT ERR IN CONSTRUING THE STATUTORY TERM "ONLY"

DOR also argues that the Wisconsin Supreme Court erred by holding Wrigley immune from taxation despite the fact that Wrigley engaged in certain activities which DOR contends were outside the scope of protected solicitation. DOR blames this result on an erroneous interpreta-

tion of whether the statute permits an exception for conduct which is *de minimis*. Petition at 19-21.

DOR's argument fails in three ways. First, DOR misreads the holding of the Wisconsin Supreme Court. The court did not hold that any of Wrigley's activities necessarily exceeded the scope of protected solicitation. To the contrary, the court held that all of Wrigley's activities in Wisconsin fell within the definition of solicitation employed by the court:

> In the context of the facts in this case and considering the nature of the chewing gum business, . . . we hold that each of Wrigley's activities in Wisconsin . . . were incidental to the solicitation of orders of gum.

(A-41.) In view of this holding, the issue in this case, if it were to be reviewed by this Court, would not be whether the statute permits an exception for *de minimis* activities. Rather the issue would be whether the particular activities in which Wrigley's employees in Wisconsin engaged can be viewed as "incidental to solicitation." This issue does not warrant review by this Court. The Court's inquiry would be fact-intensive and the Court's decision would have little application outside the unique circumstances of this case.

Second, to the extent that it is necessary to the Wisconsin Supreme Court's holding to recognize a *de minimis* exception, such an exception is well taken and is based on authority inherent in the courts which Congress did not intend to supersede.

DOR argues that the statute does not permit *any* kind of *de minimis* exception because the term "solicitation" is modified by the term "only." Review is necessary, DOR argues, because the Wisconsin Supreme Court's interpretation is so broad that the exception will become the norm and the statute will be interpreted to permit foreign corporations to "systematically" engage in sales activities outside the scope of solicitation. Petition at 20.

DOR's argument places too much emphasis on the term "only," and gives too little recognition to the plain meaning of the *de minimis* doctrine—that the law ignores trifles. Furthermore, in its attempt to add appeal to its argument, DOR unfairly characterizes the careful analysis and limited holding of the court below.

DOR asserts that the term "only" unambiguously expresses a legislative intent to foreclose any kind of *de minimis* exception. That conclusion is doubtful. The *de minimis* doctrine is a fundamental of our jurisprudence, an age-old principle that courts apply in all kinds of cases out of common sense and the need for practicality. *See, e.g., South Carolina v. Regan*, 465 U.S. 367, 400 (1984) (O'Connor, J., concurring) (recognizing Supreme Court exception to Anti-Injunction Act on basis of *de minimis* number of cases in which original jurisdiction of Supreme Court can be invoked); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 687 n.29 (1979) (*de minimis* exception to accounting requirements under Indian treaties); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned"); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 600 (1965) (*de minimis* exception to Section 7 of the Clayton Act); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (Rule 11, Fed.R.Civ.P., disregards *de minimis* violations); *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979).

If it were Congress's purpose to preclude the application of a rule as well-known and axiomatic as this, Congress would have supplied an explicit, express statement to that effect. Indeed, there is no indication whatsoever in the legislative history of Section 381 that Congress intended to relieve courts of their inherent power to disregard *de minimis* activity.

In applying Section 381, it does not make common sense to hold a taxpayer subject to taxation in a state where its activities are so minor that they have no impact upon the flow of interstate commerce. Nevertheless, DOR proposes that the Court review this case with an eye towards adopting just such an extreme interpretation of this statute. The Court should reject that invitation. The Court has always been chary to "impose grave legal consequences upon . . . distinctions that are of *de minimis* meaning and effect." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 (1984), *quoting Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962) (intra-enterprise conspiracies under the Sherman Act).

Third, DOR's argument is suspect because it is so overstated. DOR argues that the effect of the Wisconsin Supreme Court's decision is to "*prohibit*[ ] taxation unless the taxpayer engages in a requisite, but entirely unspecified, quantum" of solicitation, and goes on to suggest that the standard is unworkable because "its bounds can never be ascertained in advance by the taxpayer or the state taxing authority." Petitioner's Br. at 19-20 (emphasis in original).

To say that the bounds of a *de minimis* test can "never be ascertained" is to ignore the obvious. A *de minimis* test is inherently quite limited in scope, and is geared

to a juridical principle that is well established in practice. DOR cannot seriously suggest that courts, taxpayers and taxing authorities will have difficulty gauging the scope of such an exception. Indeed, it strains credulity for DOR to contend that to recognize a *de minimis* exception to the standard contained in Section 381 will permit the exception to overcome the rule or pave the way for "systematic exploitation of a domestic market" by a foreign corporation. Petition at 20.

In fact, DOR itself built *de minimis* exceptions into its own regulations concerning interstate sales activities. Section Tax 2.8(3), Wis. Adm. Code (which was drafted after this case arose) describes DOR's view of the line between protected and unprotected activity under Section 381 and provides that foreign companies may engage in "usual or frequent" activity in the state without triggering tax liability. Implicit in such a regulation is the acknowledgement that unusual or infrequent (*i.e.*, *de minimis*) activity falling outside the scope of solicitation is insufficient to support tax jurisdiction. (Section Tax 2.8(3) is quoted at A-179 - A-180; *see also* A-185 - A-186 (Commissioner Bartley, dissenting).) Similar guidelines promulgated by the Multistate Tax Commission, upon which the TAC relied in deciding this case (Petition at 8), also recognize that infrequent or insubstantial activities outside the scope of protected solicitation should not relieve a taxpayer of its immunity under Section 381. *See* A-249 - A-251 (for example, "minor" in-state advertising is considered to be an immune activity; likewise, maintaining an in-state display room subjects a business to taxation, unless the room is rented for two weeks or less).

In sum, the Court should deny the writ sought by DOR because the Wisconsin Supreme Court did not err in holding that all of Wrigley's activities in Wisconsin constituted

solicitation, or, to the extent they fell outside its scope, were *de minimis* and should be disregarded.

III.

THE DECISION OF THE WISCONSIN SUPREME COURT IS CONSISTENT WITH THE WELL-REASONED DECISIONS OF OTHER COURTS OF LAST RESORT

DOR contends that, whether the Wisconsin Supreme Court correctly construed the statute or not, courts of last resort around the country have come to differing interpretations of the statute, and Supreme Court review is needed to clarify its meaning.

The conflict asserted by DOR is one of appearance, not substance.[5] One reason the conflict is more apparent than real is that most of the published cases have been decided strictly on their facts, without any effort given to formulating a rule to govern other cases on other facts. *See, e.g., Clairol, Inc. v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1971). Furthermore, many cases that do attempt to articulate some starting point in their analysis depend heavily upon the labels "strict" or "broad." But those labels have little meaning in practice. A strict view of the statute that leads to a loss of immunity in one factual context might be broad enough to prohibit taxation in the factual context of a different case. Indeed, defining "solicitation" according to labels such as "broad" or "narrow" merely begs the question. Those are relative terms. Without being tethered to some *standard*, they are

[5] It is telling that, in categorizing the published cases which supposedly conflict with the decision below, DOR does not venture further than to say how a given decision is "perceived" to have interpreted Section 381. *See* Petition at 22, n.1-3.

meaningless. But neither DOR nor most of the cases it cites offer such a standard.

Few published decisions have devoted the effort that the Wisconsin Supreme Court did to analyze the statute and the intent of Congress. Most do not articulate the rule or standard which guided them to their decision (or which might guide this Court to its decision). For example, in *Chattanooga Glass Co. v. Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979), from which the DOR quotes extensively, the Georgia Supreme Court described some alternative definitions of the term "solicitation," but declined to decide which one to apply, because the taxpayer's activities exceeded all three. As a result, those cases are persuasive only insofar as their facts bear similarity to the facts before this Court—which they do not.

The only valid way to judge whether any conflict exists in this area of the law is to review the holdings of those cases that articulate some standard for how Section 381 should be applied. *U.S. Tobacco* was one such case. There is no conflict between the holding of *U.S. Tobacco* and the decision below—in fact the Wisconsin Supreme Court relied upon *U.S. Tobacco* to reach its decision. (A-36 - A-37.) This Court was asked to issue a writ to review the decision in *U.S. Tobacco*. Among the grounds asserted by the petitioner was that there was a supposed conflict among the holdings of courts of last resort regarding the scope of the term "solicitation." *See* Petition for Writ of Certiorari at 9-10, *Commonwealth of Pennsylvania v. U.S. Tobacco Company*, No. 77-1780, *cert. denied*, 439 U.S. 880 (1978). The Court denied the writ, however, and declined to review that purported conflict.

Since that decision in 1978, only three courts of last resort, according to the list in the Petition, have published opinions that are "perceived" to construe Section 381 dif-

ferently than the Wisconsin Supreme Court did in the case below: Alaska, in *Sjong v. State Department of Revenue*, 622 P.2d 967 (Alaska 1981), *appeal dismissed*, 454 U.S. 1131 (1982); North Dakota, in *Drackett Products Co. v. Conrad*, 370 N.W.2d 723 (N.D. 1985) and Arkansas in *U.S. Tobacco Co. v. Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990).

However, the decisions of these three courts are not substantially in conflict with the decision in *U.S. Tobacco* or with the decision below. *Sjong* is not in conflict because that court did not construe the term "solicitation." It had no need to; the taxpayer was delivering his product (fish) from a point within the state and selling it there, which obviously falls outside the scope of subsection 1 of the statute, without regard to whether any other conduct fell within the scope of "solicitation." *See Sjong*, 622 P.2d at 975.

Nor do *Drackett* and *Martin* present a conflict warranting review by this Court. In neither of these cases did the courts give sufficient analysis of the facts and the statute to predict whether, if presented with the facts of *this* case, they would have decided it differently. In *Drackett*, the Court stated without analysis its agreement with those courts perceived to apply the so-called "intermediate" definition. *Id.*, 370 N.W.2d at 726. It performed no analysis of their reasoning and gave no reason why the holdings of one group were any different from or superior to the holdings of another. Likewise, in the Arkansas Supreme Court's decision in *U.S. Tobacco v. Martin*, the court rejects the holdings of cases like *Wrigley* and *U.S. Tobacco*, but does so without any explanation whatsoever to justify its holding. Wrigley respectfully submits that these two cases do not pose a clear conflict with the decision below so as to warrant this Court's review.

DOR gives one other reason why this Court must issue a writ in this case. DOR argues the lack of a uniform federal statutory standard leads to situations where multistate operations either escape tax or are subjected to multiple taxation, through so-called "nowhere" sales and "throwback" rules.

To the extent this is a problem, it is one that does not warrant review, and need not be remedied by the "extensive judicial lawmaking" that would be required of this Court to create uniformity. *See Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 278 (1978). States have the power and have taken the initiative to account for sales that otherwise escape taxation. *See, e.g., GTE Automatic Electric, Inc. v. Allphin*, 68 Ill. 2d 326, 369 N.E.2d 841 (1977). As long as states can solve any problem of overlap or underlap (including those created by their own judicial interpretation of Section 381), a uniform interpretation by the Supreme Court is not necessary.

Furthermore, whether the lack of uniformity asserted by DOR is a problem or not, solving it involves a policy choice that is not this Court's to make:

> It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.

Moorman Manufacturing Co. v. Bair, 437 U.S. at 280.

In short, neither the purported conflicts among courts of last resort nor the lack of uniformity alleged by DOR warrants this Court's review.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent,
WILLIAM WRIGLEY, JR. COMPANY

August 16, 1991

No. 91-119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WISCONSIN DEPARTMENT OF REVENUE,
Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,
Respondent.

Petition For Writ Of Certiorari
To The Supreme Court of Wisconsin

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATE OF WISCONSIN
TAX APPEALS COMMISSION

****

WILLIAM WRIGLEY JR. COMPANY Wrigley Building 410 North Michigan Avenue Chicago, IL 60611 Petitioner, v. WISCONSIN DEPARTMENT OF REVENUE P.O. Box 8933 Madison, WI 53708 Respondent.	*	DOCKET NO. I-8591 FORMER COMMISSIONER SMITH'S IMPRESSIONS AS TO CREDIBILITY OF WITNESSES KROYER AND HECHT

****

Since the 1985 Wisconsin Legislature and Governor had cut short the terms of office of all members of the Wisconsin Tax Appeals Commission, but I was the only member not reappointed by Governor Earl, my term ended on October 7, 1985 (three days before the 326-page transcript/ herein was released by the private court reporter).

After extensive briefing by both parties, on November 18, 1986, the Commission (consisting of the four continuing members and my successor, who had been appointed from Respondent's legal staff) found sufficient nexus to impose Wisconsin's corporate franchise tax on Petitioner, which thereupon petitioned for review in Circuit Court

for Dane County. On August 20, 1987, Judge Nowakowski remanded this case to the Commission, for my "impressions of the credibility of the witnesses [Kroyer and Hecht] and the weight to be accorded to their testimony."

I found Witnesses Kroyer and Hecht's testimony (August 27 Transcript, pages 2 through 97, and 97 through 166, respectively) extremely credible. Respondent having offered nothing to controvert them, I would have proposed Findings of Fact, Conclusions of Law, and Order in favor of Petitioner, on its Petition for Redetermination.

I do not interpret Judge Nowakowski's decision as to require such Findings, Conclusions, and Order from me; but I am prepared to do so (or to cite specific instances of said witnesses' credible testimony) if so requested by either the Commission or Judge Nowakowski.

Dated October 12, 1987, at Madison, Wisconsin.

Respectfully submitted,

/s/ William Bradford Smith
William Bradford Smith
former member, Wisconsin
Tax Appeals Commission

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM WRIGLEY, JR. COMPANY	:	DECISION
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9A of the Tax Law for the Years 1975 through 1980.	:	

Petitioner, William Wrigley, Jr. Company, 410 North Michigan Avenue, Chicago, Illinois, 60611, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9A of the Tax Law for the years 1975 through 1980 (File No. 39340).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W. Averell Harriman State Office Building Campus, Albany, New York 12227 on February 24, 1986 at 1:15 P.M., with all briefs to be filed by May 26, 1986. Petitioner appeared by Baker & McKenzie (H. Randolph Williams, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner's activities within New York State during the years at issue constituted the solicitation of

orders, as defined by 15 U.S.C. §381 *et seq.*, thereby precluding this State from imposing a tax on petitioner's income.

FINDING OF FACT

1. Petitioner is an Illinois corporation which is engaged in the manufacture and sale of chewing gum. Its principal place of business is located in Chicago, Illinois.

2. On September 14, 1979, petitioner filed a timely claim for refund in the amount of $92,357.69 plus interest for New York State corporation franchise tax paid by it for its taxable year ended December 31, 1975.

3. On October 17, 1979, petitioner filed the following timely claims for refund of franchise tax paid by it:

Period Ended	Amount of Claim
December 31, 1976	$121,542.79 plus interest
December 31, 1977	100,734.61 plus interest
December 31, 1978	105,784.25 plus interest
December 31, 1979	18,000.00 plus interest

4. In 1981, the Audit Division conducted a field audit of petitioner's franchise tax reports for the periods ended December 31, 1978 through December 31, 1980. As a result of that field audit, the Audit Division proposed to disallow the claims for refund described in Findings "2" and "3" above, and to assert the following deficiencies in the franchise tax:

Period Ended	Amount of Deficiencies
December 31, 1978	($214.00) tax reduction
December 31, 1979	$76,056.00
December 31, 1980	$30,840.00

5. On January 6, 1982, petitioner timely protested the proposed deficiencies and denial of claims, described in Finding "4" above.

6. On April 12, 1982, the Audit Division issued the following notices of deficiency:

Period Ended	Tax	Interest	Total
December 31, 1978	$ 169.00	$ 54.00	$ 223.00
December 31, 1979	76,650.00	17,868.00	94,518.00
December 31, 1980	30,964.00	4,586.00	35,550.00

These notices of deficiency constituted a denial of the claims for refund described in Findings "2" and "3" above.

7. On May 11, 1982, petitioner timely filed its petition to redetermine the deficiencies and disallowance of refunds, described in Finding "6" above.

8. The facts relevant to petitioner's claims are the same for all taxable years in question.

9. Petitioner employed approximately 30 sales representatives who operated in New York State. Sales representatives were responsible to a regional sales manager. The regional sales manager, in turn, reported to a district manager who maintained an office in Saddlebrook, New Jersey. Petitioner did not maintain a place of business in New York during the years in question.

10. During the year 1979, petitioner established a program known as "Key Account Manager". An individual assigned to this program was given the duty of trying to increase the sales volume of established high sales volume accounts.

11. Petitioner paid each sales representative a salary, and provided the use of an automobile which was owned

by petitioner. Petitioner reimbursed the sales representatives for the operation and maintenance expenses, including storage, of the automobile assigned to each representative. In all cases where a sales representative rented garage space to store the automobile, such space was rented by the representative individually and not in the name of petitioner.

12. Petitioner's sales representatives called upon "direct" customers to increase distribution of petitioner's products. A direct account is one which buys product directly from petitioner and includes wholesalers, large retail chains, and suppliers of vending machines. The goal of a sales representative when he called upon a direct account was to increase distribution of petitioner's products. A sales representative would seek to assure that the direct account carried as close to 100 percent of petitioner's product lines as possible. In order to increase distribution, the sales representative called upon the direct account to initiate an order, to inform that individual of promotional campaigns and to encourage the optimal display of petitioner's products at the retail level. The direct account could submit an order to purchase petitioner's product, which the sales representative would then submit to the petitioner's district office in Saddlebrook, New Jersey for approval. From Saddlebrook, the order would be forwarded to the Chicago office for processing.

13. Petitioner's sales representatives also called upon "indirect" customers to increase distribution of petitioner's product. An "indirect" account, usually an independently owned retail store, is one which purchases a product from a direct store.

14. The goal of a sales representative when he visited an indirect account was to increase the distribution of petitioner's products through increased purchases by the in-

direct account from the direct account. When the sales representative visited an indirect account the representative would check displays of petitioner's products for out-of-stock products, out-of-date products, the location of the product and the number of product lines displayed. A sales representative would also explain current promotional and advertising campaigns.

15. Since a fresh product was necessary for continued sales, if a representative found out-of-date product in a display the representative would exchange, on a stick-for-stick basis, the out-of-date product with fresh product drawn from a small stock of product in his possession. Petitioner did not charge the indirect account for this exchange. The supplies of petitioner's products which were held by the sales representatives at any time, therefore, consisted of both salable and unsalable product and had negligible value.

16. On occasion, a sales representative replaced either out-of-date or undisplayed product with stock in an indirect account's storage area.

17. Occasionally, petitioner supplied an indirect account with a display stand on which to display petitioner's product. Petitioner's sales representatives would also participate either alone, or with sales representatives of other companies, in the arrangement of the displays. Petitioner supplied these display stands to a retailer free of charge and did not own the stands or consider the stands to be inventory. The stands were purchased from suppliers throughout the United States and were often shipped directly to a customer.

18. Petitioner had no telephone listing or mailing address in New York State during the taxable years in question.

19. All manufacturing activities by petitioner were performed outside New York State during the taxable years in question.

20. Petitioner maintained no stock of goods, raw materials, or supplies in New York State during the taxable years in question.

21. Petitioner owned no tangible personal property in New York State during the taxable years in question other than its product carried by the sales representatives, and the automobile which the sales representatives used as transport between customers.

22. All sales by petitioner to New York customers were shipped via a common carrier from outside New York State pursuant to orders accepted by petitioner outside New York State.

23. Petitioner did not repair or service its products after sale.

24. Petitioner's sales representatives gave no technical advice on the use of its products.

25. In accordance with the State Administrative Procedure Act §307(1), petitioners [sic] proposed findings of fact have been generally accepted. It is noted, however, that proposed finding of fact "8" has been rejected as being in the nature of legal argument.

CONCLUSIONS OF LAW

A. That 15 U.S.C. §381 (PL 86-272) states, in pertinent part:

> "(a) No State . . . shall have power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce if the

> only business activities within such State by or on behalf of such person . . . are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
>
> (b) The provisions of subsection (a) shall not apply to the imposition of net income tax by any State . . . with respect to—
>
> (1) any corporation which is incorporated under the laws of such State; or
>
> (2) any individual who . . . is domiciled in, or a resident of, such State."

B. That in order to be exempt from corporation franchise tax, the activities of the employees of the corporation must be limited to solicitation (20 NYCRR 1-3.4[b][9][iv], effective January 1, 1976). Further, the term solicitation is to be narrowly construed (*id.*) However, "[s]ome activities incidental to offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property will nevertheless be considered solicitation and will not make the corporation taxable." (*Id.*)

C. That upon all of the facts and circumstances presented, we find that petitioner's activities constituted solicitation within the meaning of 15 U.S.C. § 381 thereby

precluding New York from imposing a tax on petitioner's income. In reaching this conclusion it is noted that in *Matter of Gillette Co. v. State Tax Commn.*, (56 AD2d 475, *affd* 45 NY2d 846) the Court of Appeals held that activities substantially identical to those of petitioner were exempt from corporation franchise tax. In *Gillette*, as in this case, petitioner had no place of business, telephone listing or mailing address in New York, all manufacturing activities were performed outside of the State, petitioner maintained no stock of goods, raw materials or supplies in New York, the product carried by the sales representatives was of negligible value, sales representatives advised indirect accounts as to display techniques and all sales by petitioner were shipped via a common carrier from outside New York State pursuant to orders accepted by petitioner outside New York State. It is noted that, under the circumstances presented herein, the replacement of stale product with fresh product did not exceed the limits of solicitation (*see United States Tobacco Co. v. Commonwealth*, 386 A2d 471 [Pa] which was relied on by the Court in *Matter of Gillette Co. v. State Tax Commn.*, 45 NY2d 846, *supra*). Moreover, the fact that petitioner owned automobiles which were used in the state is of no consequence (20 NYCRR 1-3.4[b][9][iv][C]; *United States Tobacco Co. v. Commonwealth*, *supra*).

D. That the petition of William Wrigley, Jr. Company is granted, and the notices of deficiency issued April 12, 1982 are cancelled and the claims for refund are granted.

DATED: Albany, New York
March 11, 1987

STATE TAX COMMISSION

/s/ Roderick G. W. Chu
President

/s/ Francis R. Koenig
Commissioner

/s/ Mark Friedlander
Commissioner